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Please quote our reference: PFA/NP/3188/2005/RM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 ("THE ACT"): R M MUILA v CASHBUILD GROUP RETIREMENT FUND ("THE FUND"), MABOPANE CASHBUILD (PTY) LTD. AND ALEXANDER FORBES FINANCIAL SERVICES

Introduction

[1] The complaint concerns the alleged improper distribution of a death benefit and the delay in payment of it by the fund following the death of your son, Mr. P.N. Muila ("the deceased"). It was received by this office on 18 April 2005. A letter acknowledging receipt thereof was sent to you on 4 July 2005. On the same date letters were dispatched to Mabopane Cashbuild (Pty) Ltd. ("the employer") and Alexander Forbes Financial Services ("the administrator") giving them until 25 July 2005 to submit responses to the complaint. Responses from the administrator were received on 22 July 2005 and 12 January 2007. On 4 August 2005 this office received your reply. After considering the submissions before me, I find it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below. As the background facts are well known to all the parties, I shall only repeat those facts that are pertinent to the issues raised herein.

Factual Background

[2] You are the deceased's mother. He passed away on 1 September 2004. The deceased was a member of the fund by virtue of his employment with the employer. Following his death you became aware that a Ms. N.C.

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Office Manager: L Manuel

Nethavhane had also lodged a claim for the deceased's death benefit. Ms. Nethavhane claimed that she was the deceased's wife. The deceased had indicated in his "dependants and nominees" form that you and Ms. Nethavhane were his dependants. In a resolution dated 31 May 2005 the trustees of the fund found that Ms. Nethavhane and you were the deceased's dependants and should receive 60% and 40% respectively of the death benefit. The benefit has yet to be paid to the dependants.

Complaint

- [3] The crux of your complaint is that you want the fund to provide you with reasons for the delay in payment of the death benefit and you object to the trustees' distribution of the benefit. You believe that you should have received the death benefit since Ms. Nethavhane was not married to the deceased but was only his girlfriend.

Response

- [4] The administrator submitted responses on behalf of the fund and itself. It stated in its response of 22 July 2005 that it effects payment of death benefits once it receives a signed trustees' resolution detailing the persons who should receive such benefits and the manner in which payment is to be made. It advised that it was notified of the deceased's death in mid-October 2004 after he passed away on 1 September 2004. You requested payment of the death benefit on 23 November 2004. The administrator could not find any trace of a response to your request for payment and for that it apologised. It also stated that it had not received a trustees' resolution by 8 July 2005, the date on which it received your complaint, so it was unable to effect payment of the death benefit.
- [5] It stated that the administrator is not mandated to investigate beneficiary claims or any other activities as required in terms of section 37C of the Act. Its role is to effect payment once it received the signed trustees' resolution. It has requested an affidavit explaining the relationship between the deceased and Ms. Nethavhane, as well as a copy of the trustees' resolution regarding the distribution of the death benefit. The trustees have to identify the dependants, determine the allocations to the identified dependants and the manner of payment of the benefit. Based on the investigation and information obtained, the trustees found that a distribution of the death benefit in the ratio of 60% to Ms. Nethavhane and 40% to you as dependants of the deceased would be equitable and reasonable.
- [6] The administrator informed this office in its response of 12 January 2007 that the death benefit had not been paid as yet because the insurer underwriting the fund's group life assurance benefit requires a certified

copy of the deceased's death certificate before it pays any money to the fund. The claim would only be finalised once this document has been received.

Determination and reasons therefor

- [7] The payment of death benefits is regulated by section 37C of the Act, read in conjunction with the definition of a “dependant” in section 1. The primary purpose of this section is to protect those who were financially dependant on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation of the deceased. It is the board of management's responsibility when dealing with payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable.
- [8] In order for the board to ensure that it makes an equitable distribution of the benefit, they will normally undertake an investigation to determine potential beneficiaries. The board must then decide on a distribution of the death benefit after the deceased's dependants have been identified. Section 37C(1)(a) of the Act is applicable to the present distribution because the deceased had dependants. In this matter, the deceased does not have children. He completed a “dependants and nominees” form on 7 November 2003 in which he noted Ms. Nethavhane and you as his dependants. Further, in a funeral benefit application form dated 1 November 2001 he noted that Ms. Nethavhane was his spouse and that you were an “additional dependant” of his. Ms. Nethavhane provided an affidavit to the fund wherein she confirms that she was the customary wife of the deceased and that lobola was paid to her family. The fund also received a letter from the head of Ms. Nethavhane's village wherein it is confirmed that the deceased and her were married. In my view the board correctly identified Ms. Nethavhane and you as the deceased's dependants.
- [9] The next duty placed on the board is to decide on an equitable distribution between the dependants identified. The board's duty in this regard was cogently summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25, as follows:
- “When making an “equitable distribution” amongst dependants the board of management has to consider the following factors:
- the age of the dependants;
 - the relationship with the deceased;
 - the extent of dependency;
 - the wishes of the deceased placed either in the nomination and/or his last will; and
 - financial affairs of the dependants including their future earning capacity

potential.

In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way.”

- [10] It is evident from the above that the board is vested with a discretionary power to decide on an equitable distribution of the death benefit. It is trite law that only in instances where the functionary has exercised its discretionary powers unreasonably and improperly, or has unduly fettered its exercise thereof, that its decision can be reviewed.
- [11] Aside from the information regarding the marital status of the deceased and Ms. Nethavhane, the board also received information regarding the extent of her financial dependency on the deceased. Thus, even if Ms. Nethavhane was not considered to be the deceased’s spouse, she still qualified as a factual dependant of the deceased as envisaged by the definition of “dependant” in paragraph (b)(i) of section 1 of the Act. Similarly, the board received information on your financial dependency on the deceased.
- [12] After considering all the information before me I am satisfied that the board has acted reasonably and properly in this case when it decided on a distribution of 60% of the benefit to Ms. Nethavhane and 40% to you. It cannot be said that the opinion it formed was not an honest one, nor can it be said that it was not reasonable in the circumstances. Therefore, no legal grounds exist for me to alter its decision in this regard and your first complaint is dismissed.
- [13] Your second complaint concerns the delay in paying the death benefit to the identified dependants. The trustees’ resolution concerning the distribution of the death benefit was provided by the administrator in its response of 12 January 2007. The resolution is dated 31 May 2005. However, the benefit has still not been paid to the dependants. The administrator explained that no payment has been made because the fund has yet to provide a copy of the deceased’s death certificate to the insurer of its group life assurance benefit, so it does not have the money to pay the claim. At the very least, this piece of information ought to have been obtained when the death benefit claim was initiated in October 2004. In my view the long delay in effecting payment, especially since the trustees’ resolution was taken almost 1 year and 10 months ago, is unacceptable and the reason provided for the delay is wholly unconvincing.
- [14] Accordingly, the order of this tribunal is as follows:

The fund is directed to effect payment of the death benefit payable following the death of Mr. P.N. Mula to the identified dependants in the

proportions decided by it, less any deductions in terms of sections 37A and 37D of the Pension Funds Act, 1956, within four weeks of the date of this determination.

Dated at Johannesburg on this the day of 2007

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator